Public Prosecutor v Chin Chan Leong & Anor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS MT(4)42–61 OF 2006 AND 42–65 OF 2006
LIM YEE LAN J
11 NOVEMBER 2008

Criminal Procedure — Appeal — Petition of — Failure to put forward detailed points of law or fact in grounds of appeal — Whether defective and fundamentally flawed — s 307(6) of the Criminal Procedure Code — Whether complied — Discretion to order amendment — Criminal Procedure Code s 310

Criminal Procedure — Charge — Defective charge — Appeal against — Whether charge vague and uncertain — Whether legal requirement of framing charges in ss 152, 153 and 154 of the Criminal Procedure Code complied with — Whether charge of abetment could be framed generally

The public prosecutor ('PP') was appealing against the decision of the learned sessions court judge, firstly, in upholding the preliminary objection of the two respondents against the charges preferred against them under s 84(1) of the Securities Industry Act 1983 ('SIA'), secondly, his direction to the PP to give further particulars to the first respondent regarding the two charges against him and thirdly, to amend the two abetment charges against the second respondent. The first respondent was charged with two offences under s 84(1) of the SIA for manipulating the shares of Fountain View Development Berhad while the second respondent was charged for abetting the first respondent to commit the offences. The learned sessions court judge held that while the two charges against the first respondent had complied with the legal requirement of the framing of charges under the Criminal Procedure Code ('CPC'), nevertheless, it was felt that certain particulars should be added which would put into focus the nature of the trading of shares alleged and assist the court in determining the relevancy of the evidence to be adduced. Meanwhile, the charges against the second respondent according to the learned trial judge were defective and did not comply with the provisions of the CPC because the particulars of the abetment were not specified. This had left both counsel and the court guessing as to the nature of the abetment. Consequently, the PP was directed to amend the charges to specify the manner of the abetment. The issues raised before the court were as follow: (a) whether the petition of appeal was defective for non-compliance with s 307(6) of the CPC; (b) whether the learned trial judge erred in law and in

fact when directing the appellant to supply further information to two charges against the first respondent; and (c) whether the learned trial judge erred in law and in fact in finding that the two abetment charges against the second respondent were defective and further, directing the appellant to amend the two charges.

Held, allowing the appeal and directing the sessions court to proceed with the trial:

(1) The petition of appeal did not comply with s 307(6) of the CPC in that the grounds stated in the said petition did not put forward detailed points of law or fact under which the grounds would be argued on appeal. However, the non-compliance did not result in any prejudice to the first respondent or a miscarriage of justice in this case (see para 15).

(2) On the issue of lack of particularity in the charges framed, learned counsel for the first respondent was perfectly aware of the nature and substance of the PP's appeal which was essentially against the entire decision of the learned sessions court judge. Therefore, pursuant to s 310 of the CPC, the court would allow the appellant to make an application to amend the petition of appeal (see paras 16–17).

(3) Having regard to the nature and substance of the offence as created under s 84(1) of the SIA and the wordings in the two charges preferred against the first respondent, the wordings in the two charges have clearly stated the particulars of the time, place and person ('the first respondent') who had committed the offence and the manner as to how the offence had been committed as required by ss 152, 153 and 154 of the CPC. The two charges have clearly stipulated all the ingredients of the offence and provide sufficient notice of the allegations against the first respondent. Consequently, the prosecution had fulfilled the requirements of the law in the CPC as regards the framing of the charges (see paras 24–25).

(4) Further, based on the list of documents supplied to the respondents pursuant to s 51A of the CPC, it was apparent that the first respondent was in possession of all the relevant information pertaining to the trade, such as the dates for each transaction which took place and the numbers of shares traded. The learned sessions court judge therefore erred in directing further particulars to be provided to the first respondent when the details ordered by the learned trial judge would constitute the evidence to be adduced by the prosecution during the trial to prove each such ingredient (see para 26).

(5) Based on the authorities, the two charges as presently worded against the second respondent were not defective and were legally valid. A charge of abetment could be framed generally and it was up to the prosecution to prove any one or all of the forms of abetment as referred to in s 107 of the Penal Code and it was for the trial court to decide, based on the evidence before it, whether any one or all of the limbs of abetment have been proven (see paras 29 & 34).

[Bahasa Malaysia summary

Pendakwa raya ('PR') merayu terhadap keputusan hakim mahkamah sesyen yang bijaksana, pertama, dalam membenarkan bantahan awal kedua-dua responden terhadap pertuduhan-pertuduhan yang dikenakan terhadap mereka di bawah s 84(1) Akta Perindustrian Sekuriti 1983 ('APS'), kedua, arahannya kepada PR agar memberikan butiran lanjut kepada responden pertama berkaitan dua pertuduhan terhadapnya dan ketiga, meminda dua pertuduhan bersubahat terhadap responden kedua. Responden pertama dipertuduhkan dengan dua kesalahan di bawah s 84(1) APS kerana memanipulasi saham Fountain View Development Berhad sementara responden kedua dituduh bersubahat dengan responden pertama melakukan kesalahan tersebut. Hakim mahkamah sesyen yang bijaksana memutuskan bahawa walaupun kedua-dua pertuduhan terhadap responden pertama memenuhi kehendak undang-undang dalam merangka pertuduhan-pertuduhan tersebut menurut Kanun Prosedur Jenayah (KPJ), tetapi, dirasakan butiran tertentu perlu ditambah bagi memfokuskan sifat dagangan saham yang didakwa dan boleh membantu mahkamah menentukan hubungan keterangan yang dikemukakan. Menurut hakim bicara yang bijaksana, pertuduhan-pertuduhan terhadap responden kedua adalah cacat dan tidak menurut peruntukan-peruntukan KPJ oleh sebab butiran subahat tidak diperincikan. Ini mengakibatkan kedua-dua peguamcara dan mahkamah meneka-neka sifat subahat itu. PR kemudiannya diarahkan meminda pertuduhan-pertuduhan tersebut untuk menjelaskan cara bersubahat. Isu-isu yang dibangkitkan di hadapan mahkamah adalah: (a) sama ada petisyen rayuan cacat kerana tidak mematuhi s 307(6) KPJ; (b) sama ada hakim bicara yang bijaksana khilaf di sisi undang-undang dan fakta apabila mengarahkan perayu untuk memberi maklumat lanjut terhadap dua pertuduhan terhadap responden pertama; dan (c) sama ada hakim bicara yang bijaksana khilaf di sisi undang-undang dan fakta apabila mendapati kedua-dua pertuduhan subahat responden kedua cacat dan seterusnya mengarahkan perayu meminda kedua-dua pertuduhan tersebut.

Diputuskan, membenarkan rayuan dan mengarahkan mahkamah sesyen meneruskan perbicaraan:

(1) Petisyen rayuan tersebut tidak mematuhi s 307(6) KPJ kerana

alasan-alasan dalam petisyen tersebut tidak menyatakan isi-isi perundangan atau fakta yang terperinci yang mana alasan-alasan tersebut akan dikemukakan semasa rayuan. Walau bagaimanapun, ketidakpatuhan tidak mengakibatkan sebarang prejudis terhadap responden pertama atau ketidakadilan dalam kes ini (lihat perenggan 15).

(2) Dalam isu tiada perincian dalam pertuduhan yang dirangka, peguam yang bijaksana bagi pihak responden pertama amat memahami sifat dan hal perkara rayuan PR yang mana perlu terhadap keseluruhan keputusan hakim mahkamah sesyen yang bijaksana. Oleh itu, berikutan dengan s 310 KPJ, mahkamah tentu membenarkan perayu membuat permohonan untuk meminda petisyen rayuan (lihat perenggan 16–17).

(3) Mengambilkira sifat dan hal perkara kesalahan tersebut seperti yang dibentuk di bawah s 84(1) APS dan juga bahasa dalam kedua-dua pertuduhan yang dikenakan terhadap responden pertama, bahasa dalam kedua-dua pertuduhan tersebut jelas menyatakan butiran masa, tempat dan orang (responden pertama) yang melakukan kesalahan tersebut dan bagaimana kesalahan tersebut dilakukan seperti dikehendaki oleh ss 152, 153 dan 154 KPJ. Kedua-dua pertuduhan jelas telah menyatakan kesemua intipati kesalahan dan memberikan notis yang mencukupi tentang dakwaan-dakwaan terhadap responden pertama. Maka, pihak pendakwaan memenuhi kehendak perundangan dalam KPJ berkaitan dengan perangkaan pertuduhan-pertuduhan tersebut (lihat perenggan 24–25).

(4) Selanjutnya, berdasarkan senarai dokumen yang diberikan kepada responden-responden berikutan dengan s 51A KPJ, adalah jelas bahawa responden pertama memiliki kesemua maklumat relevan tentang dagangan tersebut, seperti tarikh-tarikh setiap transaksi dan juga jumlah saham yang didagangkan. Maka hakim mahkamah sesyen yang bijaksana khilaf apabila mengarahkan butiran-butiran lanjut diberikan kepada responden pertama apabila maklumat yang diarahkan itu merupakan keterangan yang akan dikemukakan oleh pihak pendakwaan semasa perbicaraan untuk membuktikan setiap intipati (lihat perenggan 26).

(5) Berdasarkan autoriti-autoriti, kedua-dua pertuduhan seperti yang dirangka terhadap responden kedua tidak cacat dan sah di sisi undang-undang. Pertuduhan untuk subahat boleh dirangka secara am dan terpulang kepada pihak pendakwaan untuk membuktikan salah satu atau kesemua bentuk-bentuk subahat seperti yang dirujuk dalam s 107 Kanun Keseksaan dan juga untuk hakim perbicaraan untuk memutus, berdasarkan keterangan yang dikemukakan, sama ada salah satu atau kesemua bahagian subahat telah dibuktikan (lihat perenggan 29 & 34).]

Notes

For cases on defective charge, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1083–1115.

For cases on petition of appeal, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 576–579.

Cases referred to

Ab Malek bin Atan v PP [2002] 4 MLJ 84, HC (folld)

Datuk Haji Harun bin Haji Idris & Ors v PP [1978] 1 MLJ 240, FC (folld)

Foo Loke Ying & Anor v Television Broadcast Ltd & Ors [1985] 2 MLJ 35, SC (refd)

Husdi v PP [1980] 2 MLJ 80, FC (dist)

Leken @ Delem ak Gerikk (M) v PP [2007] 3 MLJ 730, HC (refd)

Pasupathy a/l Kanagasaby v PP [2005] 1 MLJ 493, CA (folld)

PP v Jolius Dulius Sulijip & Ors [2004] MLJU 47, HC (refd)

PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)

PP v Peter Kong [2005] 1 MLJ 414, HC (refd)

PP v Tan Tho Kim & Ors [1978] 2 MLJ 65, HC (refd)

Robert Lee @ Robert Seet & Anor v Wong Ah Yap & Anor [2007] 4 MLJ 393, FC (refd)

Sarikei District Council v Hamzah bin Kiprawi & Ors [1997] 5 MLJ 328, HC (refd)

Sulfee bin Alias v PP [2006] MLJU 363, HC (refd)

Tennakoon D Harold v PP [1997] 4 MLJ 497, HC (refd)

Yan Wing Lee v PP [1994] 2 CLJ 453, HC (refd)

Legislation referred to

Criminal Procedure Code ss 51A, 152, 153, 154, 307(6), 310

Penal Code ss 107, 109, 405, 409

Securities Industry Act 1983 ss 84(1), 88B, 122C

Foo Li Mei (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Rajan Navaratnam (Vinod Kamalanathan with him) (Vinod Kamalanathan & Associates) for the first respondent.

Edmund Bon (Nik Ikhwan with him) (Chooi & Co) for the second respondent.

Lim Yee Lan J:

INTRODUCTION

[1] This is an appeal by the public prosecutor ('PP') against the decision of the learned Kuala Lumpur Sessions Court judge ('SCJ') in upholding the preliminary objection ('PO') of the two respondents against the charges preferred against them under s 84(1) of the Securities Industry Act 1983

('SIA') and his direction to the PP to give further particulars to the first respondent in regard to the two charges against him and to amend the two abetment charges against the second respondent.

BACKGROUND

[2] On 27 June 2005, Chin Chan Leong (first respondent) was charged with two offences under s 84(1) of the SIA for manipulating the shares of Fountain View Development Bhd ('FVDB') while Hiew Yoke Lan (second respondent) was charged for abetting the first respondent to commit the offences. The two charges against the first respondent are as set out in pp 7–12 while the charges against the second respondent are in pp 14–15 of the of the appeal record.

[3] At the sessions court, counsel for both respondents raised the following PO against the charges:

(a) the two charges against the first respondent are vague and uncertain;

(b) the two charges against the second respondent violate s 154 of the Criminal Procedure Code ('CPC') because the manner of the abetment alleged are not specified.

[4] In his decision on 5 June 2006 (see pp 71–82 of the appeal record), the learned SCJ held as follows:

(a) the two charges against the first respondent generally complied with the legal requirement of framing of charges under the CPC. Nevertheless he felt that certain particulars needed to be added which would put into focus the nature of the trading of shares alleged and assist the court in determining the relevancy of the evidence to be adduced. In the event the PP was directed to provide the first respondent with the following further information to the appendices attached to the two charges:

   (i) the specific dates the FVDB shares were transactions;

   (ii) the number of FVDB shares that were transacted on those specific dates;

   (iii) the name of persons in the stock broking companies who were involved in the trading of the FVDB shares; and

   (iv) a copy of all the contract notes for the transactions in FVDB shares.

(b) the charges against the second respondent were defective and do not comply with the provisions of the CPC because the particulars of the abetment were not specified which left both counsel and the court guessing as to the nature of the abetment and that it was a cardinal

principle of law that the accused should know the exact nature of the charge against him even at the point the charge is read to him for the first time. Consequently, the PP was directed to amend the charge to specify the manner of the abetment.

GROUNDS OF APPEAL

[5] The grounds of appeal of the appellant are as stated in the three paragraphs in its petition of appeal on pp 3–4 of the appeal record.

[6] Parties to this appeal had filed written submissions for my consideration and in their respective submissions they had raised various issues. In addition, the first respondent had raised a preliminary objection (PO) regarding the petition of appeal.

PRELIMINARY OBJECTION RAISED BY THE FIRST RESPONDENT ON THE PETITION OF APPEAL

[7] The PO raised by the first respondent was that the petition of appeal is defective and fundamentally flawed as there had been a complete failure to comply with s 307(6) of the CPC which states that:

> 307(6) Every petition shall state shortly the substance of the judgment appealed against and shall contain definite particulars of the points of law or of fact to which the court appealed from is alleged to have erred.

[8] The PO was essentially premised on three grounds. The first ground was that the petition of appeal (in pp 3–4 of the appeal record) merely states that the learned SCJ had erred in fact and in law in his decision but does not state the basis of law such an error is premised upon.

[9] It was submitted that the purpose of s 307(6) of the CPC is to enable the first respondent to reply to the said appeal accordingly as opposed to having to guess the nature of the appeal concerned and to respond blindly. The cases of *Public Prosecutor v Tan Tho Kim & Ors* [1978] 2 MLJ 65, *Yan Wing Lee v Public Prosecutor* [1994] 2 CLJ 453, *Public Prosecutor v Jolius Dulius Sulijip & Ors* [2004] MLJU 47, *Sulfee bin Alias v Public Prosecutor* [2006] MLJU 363 and *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281 were referred to in which it was, inter alia, held that by virtue of s 307(6) of the CPC a petition of appeal must set out with sufficient particularity the grounds upon which it was alleged the judgment or order appealed from was wrong, including the definite particulars of the points of law or fact the learned SCJ was alleged to have erred and that the requirement is mandatory and its non-compliance is fatal.

[10] The second ground of the PO was that the said petition is also flawed when it states in item (a) that the learned SCJ had in fact ruled that the charge was in accordance with the law when a reading of the grounds of the decision showed that he had specifically expressed his reservations and concluded that the charges ought to be amended thereby concluding that the said charges did not comply with ss 152, 153 and 154 of the CPC. Alternatively, it was submitted that if the prosecution were to adopt the stand that the learned SCJ had in fact ruled that the charges were in conformity with ss 152, 153 and 154 of the CPC, then it is logical to assume that the defence's PO before the sessions court was overruled and consequently all other directions handed down thereon tantamount to a procedural ruling which by virtue of s 307 of the CPC are not appealable, citing *Tennakoon D Harold v Public Prosecutor* [1997] 4 MLJ 497 in support of its contention.

[11] The third ground of the PO was that the petition was flawed and misleading when it stated that the learned SCJ's direction that names of the persons involved in the trading of shares be disclosed is in conflict with the Federal Court's case of *Husdi v Public Prosecutor* [1980] 2 MLJ 80 in which the facts were different from this case. In *Husdi*'s case, the applicant accused had sought to obtain copies of statements made by witnesses for the prosecution in advance of the trial for the purpose of impeaching the credit of the said witnesses. In the present case the learned SCJ did not make such a direction but merely directed that the names of the remisier/dealer be disclosed in the charges.

[12] In conclusion, it was submitted, based on the authority of *Foo Loke Ying & Anor v Television Broadcast Ltd* [1985] 2 MLJ 35 and the *Robert Lee @ Robert Seet & Anor v Wong Ah Yap & Anor* [2007] 4 MLJ 393, that as the High Court is a creature of statute and has no jurisdiction other than granted by law and statute and for this court to hear a petition of appeal, such petition must first conform with statute. Reference was also made to Practice Direction Note No 16 of 1946 issued by the Supreme Court of the Malayan Union that a petition of appeal should set forth precisely, succinctly and clearly the grounds which will be argued on appeal so as to give fair notice to counsel the points which they may reasonably be expected to meet on the hearing of the appeal. In this case, the first respondent is perplexed as to the nature and substance of the PP's appeal as contained in its petition of appeal and hence is unable to respond precisely to the said appeal. In the circumstances the first respondent prayed that its PO be allowed and the appeal be dismissed.

ISSUES FOR DETERMINATION

[13] It would appear from the submissions of both parties that this appeal raises the following issues for determination:

(a) in regard to the PO raised by the first respondent, whether the petition of appeal was defective for non-compliance with s 307(6) of the CPC?;

A (b) in regard to the two charges framed against the first respondent, did the learned SCJ err in law and in fact in directing the appellant to supply the further information as specified in his direction in the appendices attached to those charges?

B (c) in regard to the two abetment charges against the second respondent, did the learned SCJ err in law and in fact in finding that those charges were defective and further directing the appellant to amend the two charges?

C FINDING AND DECISION

[14] Having read the appeal record, the provisions of s 84(1) of the SIA, the relevant provisions in the CPC governing the framing of charges, ie ss 152, 153 154, and the written submissions of respective parties and the D decided authorities cited therein and the grounds of judgment of the learned SCJ I hereby dismiss the PO of the first defendant and allow the appeal of the appellant, based on the following grounds.

E DECISION ON THE PRELIMINARY OBJECTION

[15] In regard to the PO raised by learned counsel for the first respondent on the petition of appeal, I do not propose to deal with the second and third grounds raised by learned counsel for the first respondent in his PO because F to my mind they had been sufficiently replied to by the appellant in its reply and submission dated 10 November 2008. With regard to the third ground of the PO, having perused the petition of appeal in the appeal record, I tend to agree with learned counsel for the first respondent that the petition of appeal did not comply with s 307(6) of the CPC in that the grounds stated G in the said petition do not put forward detailed points of law or fact under which the grounds will be argued on appeal.

[16] Be that as it may, I agree with the submission of the appellant as stated in its submission and reply to the PO dated 10 November 2008, in particular H para 3.1 and the cases of *Public Prosecutor v Peter Kong* [2005] 1 MLJ 414; *Leken @ Delem ak Gerikk (M) v Public Prosecutor* [2007] 3 MLJ 730, *Sarikei District Council v Hamzah bin Kiprawi & Ors* [1997] 5 MLJ 328 and *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281 cited therein, that such non-compliance did not result in any prejudice to the first respondent or a I miscarriage of justice in this case. This is because it is clear from the written submissions on behalf of the first respondent that learned counsel was perfectly aware of the nature and substance of the PP's appeal which was essentially against the entire decision of the learned SCJ based on the PO raised by him on behalf of the first respondent in regard to the lack of

particularity in the charges framed against the first respondent at the sessions court, which according to him was a contravention of ss 152, 153 and 154 of the CPC.

[17] In any event, even if I am wrong in my view, I would have used my discretion under s 310 of the CPC to allow the appellant to make an application to amend the petition of appeal. Based on the foregoing reasons I hereby dismiss the PO of the first respondent.

Did the learned SCJ erred in law and in fact in directing the appellant to supply the further information in the terms specified in his direction in the appendices attached to the charges to the first respondent?

[18] In regard to this issue, having considered s 84(1) of the SIA under which the first respondent was charged and perused the wordings of the two charges preferred against both the two respondents, I am of the considered view that the charges have complied with the provisions of ss 152, 153 and 154 of the CPC with regard to the framing of charges based on the following grounds.

[19] It is clear from ss 152, 153 and 154 of the CPC that a charge must state firstly, the offence that is alleged to have been committed by the accused including the laws and the section of the law (s 152), secondly, the particulars of the time, place and person who committed the offence (s 153) and thirdly, the manner the offence was committed (s 154).

[20] The two charges against the first respondent were framed pursuant to s 84(1) of the SIA which reads as follows:

> 84 False trading and market rigging transactions
>
> (1) Subject to section 87B, no person shall create, or cause to be created, or do anything that is calculated to create, a false or misleading appearance of active trading in any securities on a stock market in Malaysia or a false or misleading appearance with respect to the market for, or the price of, any such securities.

[21] A reading of s 84(1) shows that there are two limbs to the said section, the first limb being to create, or cause to be created, or do anything which is calculated to create, a false or misleading appearance of active trading in any securities on a stock market in Malaysia and the second limb being to create, or cause to be created, or do anything that is calculated to create, a false or misleading appearance with respect to the market for, or the price of, any such securities.

A [22] The first charge against the first respondent, which relates to an offence under the first limb of s 84(1), states that between the dates specified in the charge, the first respondent had created a misleading appearance of active trading of securities of FVDB by indirectly engaging in transactions where there is no change in the actual ownership of the security through the B 20 securities accounts in the eight stockbroking companies as specified in the appendix to the charge.

[23] Similarly, the second charge, which relates to the offence under the second limb of s 84(1), states that between the dates stated in the charge, the C first respondent had caused to be created a misleading appearance with respect to the price of FVDB shares by indirectly concerned in the transactions of sale and purchase of FVDB shares that do not involve any change in the beneficial ownership of the said FVDB shares which have the effect of raising the price of FVDB and such transactions were executed D through the central depository securities accounts which is an offence under s 84(1) of the SIA punishable under s 88B of the Act.

[24] Having regard to the nature and substance of the offence as created E under s 84(1) of the SIA and the wordings in the two charges preferred against the first appellant and the appendix to the said charges, I am of the considered view that the wordings in the two charges have clearly stated the particulars of the time, place and person (the first respondent) who had committed the offence and the manner as to how the offence had been F committed as required by ss 152, 153 and 154 of the CPC.

[25] Thus, in my considered view, the two charges have clearly stipulated all the ingredients of the offence and provide sufficient notice of the allegations against the first respondent. Consequently, the prosecution has G fulfilled the requirements of the law in the CPC as regards the framing of the charges.

[26] In addition, I also agree with the appellant that based on the list of documents supplied to the respondents pursuant to s 51A of the CPC, it is H apparent that the first respondent is in possession of all the relevant information pertaining to the trades such as the dates for each transaction which took place and the numbers of shares traded. The learned SCJ therefore erred in directing further particulars to be provided to the first respondent when the details ordered by the learned SCJ would constitute the I evidence to be adduced by the prosecution during the trial to prove each such ingredient.

[27] I further agree with the appellant that in view of the history and circumstances of this case as narrated in paras 3.0 to 3.4 of the appellant's

submission, disclosure of the names of the remisiers/dealers who could be potential prosecution witnesses would create a real risk of these witnesses being tempered with by the first respondent.

Did the learned SCJ erred in law and in fact in finding that the abetment charges preferred against the second respondent were defective and further directing the PP to amend the two charges?

[28] This issue relates to the second respondent who was charged with abetting the first respondent in committing the two offences under s 84(1) read together with s 122C of the SIA and punishable under s 88B of the same Act. Section 122C of the SIA reads as follows:

> 122C Attempts, abetments and conspiracies
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> A person who —
>
> (a) ...
>
> (b) ...
>
> (c) abets or... (as those terms are defined in the Penal Code) any offence under this Act, whether or not the offence is committed in consequence thereof, commits such offence and is liable to the penalty for such offence.

While s 107 of the Penal Code reads as follows:

> 107 Abetment of a thing
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> A person abets the doing of a thing who —
>
> First — Instigates any person to do that thing; or
>
> Secondly — Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly — Intentionally aids, by any act or illegal omission, the doing of that thing.

[29] In regard to this issue, having considered the respective written submissions of the parties, I tend to agree with the submission of the appellant that based on the authority of *Ab Malek bin Atan v Public Prosecutor* [2002] 4 MLJ 84, *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240 and *Pasupathy a/l Kanagasaby v Public Prosecutor* [2005] 1 MLJ 493, the two charges as presently worded against the second respondent are not defective and are legally valid.

[30] In *Ab Malek bin Atan v Public Prosecutor*, in the course of his judgment when discussing the sufficiency of the rape charge, Augustine Paul J (as he then was) opined as follows:

> It follows that where an offence is given a specific name, it is sufficient to describe the offence in the charge by that name only. This is so even of the specific name given may incorporate several circumstances in which the offence may be committed. In explaining the operation of this rule, consider it pertinent to refer to the AIR Commentaries on the Code of Criminal Procedure (7th Ed) (Vol 2) at pp 562–563:
>
> > Where an offence has a name given to it by law such as 'rioting' 'theft', etc, the charge may describe it by name only. Thus, in a charge under s 147 of the Penal Code, where the word 'rioting is included in the charge, the words 'by force or by show of force' need not be included because the suggestion of force is in the rioting. *Similarly, it is open to the prosecution to charge abetment generally and then, if the evidence did not establish abetment other than in one particular form, to rely on this particular form for a conviction. The charge will amount to a notice that he will have to meet a case of abetment in one or more of the different ways indicated dins. 107 of the Penal Code* ...
>
> (Emphasis added.)

[31] The effect of the judgment is that it is open to the prosecution to charge abetment generally and it is up to the trial judge to decide from the available evidence what limb of abetment has been proven by the prosecution and in fact a trial judge can conclude based on the evidence before it that all three limbs of abetment have been proven.

[32] This would seem to be the effect of the Federal Court's decision in *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor*. In that case, the first and third appellants had been charged for abetting the offence of criminal breach of trust committed by the second appellant pursuant to ss 109 and 409 of the Penal Code. It was held by the Federal Court at p 252 that in the light of the evidence regarding the conduct of the two appellants, the High Court judge's finding that the acts of the first appellant fell within all three limbs of s 107, namely by instigation, conspiracy and intentionally aiding, and that the acts of the third appellant came under the second and third limbs, were right and should not be disturbed.

[33] Similarly, in the case of *Pasupathy a/l Kanagasaby v Public Prosecutor*, the appellant was charged pursuant to 405 of the Penal Code read with s 109 of the same Code for abetting PW1 in cheating Malayan Banking Bhd. The Court of Appeal agreed with the findings of the lower courts that the acts of the appellant fell within two of the limbs in s 109, ie he had instigated and aided PW1 in committing the said offence.

[34] I thus agree with the appellant that based on the authority of the aforesaid cases, a charge of abetment can be framed generally and it is up to the prosecution to prove any one or all of the forms of abetment as referred to in s 107 of the Penal Code and it is for the trial court to decide, based on the evidence before it, whether any one or all of the limbs of abetment have been proven.

[35] In conclusion, based on the foregoing discussions and findings, I hereby allow the appeal of the appellant and direct that the trial at the sessions court to proceed accordingly.

Appeal allowed.

Reported by Ashgar Ali Ali Mohamed